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93-911

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1993
NO. ____

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

VS.

PATRICK FOUNTAIN,
and
DECARUS THOMAS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA
PETITION FOR WRIT OF CERTIORARI

Dennis C. McAndrews
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49 pp

QUESTION PRESENTED FOR REVIEW

Do the Fourth and Fourteenth Amendments to the United States Constitution require the suppression of evidence seized by a police officer during a search of a vehicle following a lawful stop, where 1) the vehicle drove away from the officer at a high rate of speed from a high crime area and ignored traffic control devices at a railroad crossing gate which warned of an oncoming train, 2) the officer observed furtive movements among the vehicle's three occupants upon stopping the vehicle, and 3) the operator of the vehicle was unable to provide a valid driver's license or proof of ownership of the vehicle?

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IN THE SUPREME COURT
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COMMONWEALTH OF PENNSYLVANIA,
Petitioner

VS.

PATRICK FOUNTAIN,
and
DECARUS THOMAS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to the Supreme Court of Pennsylvania to review the Judgment and Opinion of the Superior Court of Pennsylvania entered in this case.

OPINIONS BELOW

The Opinion of the Superior Court of Pennsylvania in Commonwealth v. Fountain, has been reported at ___ Pa.Super. ___, 621 A.2d 124, (1992), and is set forth in full in Appendix A of this Petition. The Opinion of the Superior Court in Commonwealth v. Thomas is unpublished and is also set forth in Appendix A. The unpublished Opinions of the Court of Common Pleas of Delaware County are set forth in full in Appendix B of this Petition.

STATEMENT OF JURISDICTION

In Commonwealth v. Fountain, the judgment of the Pennsylvania Superior Court was entered on December 23, 1992. That Court refused the Commonwealth's application for reargument by Order dated March 4, 1993. The Pennsylvania Supreme Court refused review of Fountain by Order dated September 9, 1993.

In Commonwealth v. Thomas, the judgment of the Pennsylvania Superior Court was entered on April 27, 1993. The Supreme Court refused review of Thomas by Order dated September 16, 1993.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Fourteen, Section One, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 15, 1991, at approximately 11:30 p.m., Officer Richard Gibney of the Darby Borough Police Department was on duty in full uniform in the vicinity of 6th Street and Greenway Avenue in Darby Borough, an area well known for its high crime rate and illegal drug activity. (R-12,13). Officer Gibney observed a parked vehicle with three occupants including respondents herein; two individuals were seated in the front seat and one was in the back seat. (R-13). As the officer approached, the parked vehicle pulled away at a high rate of speed. (R-13). Officer Gibney followed the vehicle and, at the intersection of 5th Street and Greenway Avenue, the subject vehicle ignored warning lights indicating that a train was approaching and proceeded around the lowered railroad grade crossing gates. (R-13). Officer Gibney activated his siren and lights and stopped the vehicle approximately five blocks away for violations of the Pennsylvania Motor Vehicle Code. (R-13).

Upon stopping the vehicle, Officer Gibney observed substantial unusual movement among all three occupants. (R-13,14). The officer requested the operator of the vehicle to produce his driver's license and registration card. The operator could not produce either. (R-13). By this time, three other police officers had arrived at the scene to back up Officer Gibney. (R-22). The occupants were directed to exit the vehicle and step to the rear of the vehicle where they were patted down for the officers' safety. (R-16).

While the other officers remained with the three occupants, Officer Gibney looked inside the passenger compartment of the vehicle and observed a bulge in the seatback pouch of the driver's seat; the officer reached into the pouch and recovered a .25 caliber pistol.[1] (R-17). The three occupants of the vehicle -- including Fountain and Thomas -- were then placed under arrest pursuant to 18 Pa.C.S.A. Sec. 6106, Possession of a Firearm Without a License and

18 Pa.C.S.A Sec 903, Criminal Conspiracy.

Prior to trial, the defendants filed motions to suppress the seizure of the gun. On January 13, 1992, the trial court conducted a hearing in connection with this motion. After hearings, the Honorable Charles C. Keeler granted defendants' motions to suppress. Inasmuch as this order would terminate the instant prosecution, the Commonwealth appealed to the Pennsylvania Superior Court from that order. On December 23, 1992, a divided Superior Court affirmed the lower court in Fountain in a published opinion; on April 27, 1993, the Superior Court affirmed the lower court in Thomas on the basis of its earlier opinion in Fountain. The Commonwealth's Petitions for Allowance of Appeal in Fountain and Thomas were denied by the Pennsylvania Supreme Court on September 9, 1993, and September 16, 1993, respectively.

REASONS FOR GRANTING THE WRIT

A. The Majority Opinion of the Pennsylvania Superior Court Has Seriously Misapplied Federal Constitutional Law Regarding The Proof Necessary To Conduct A Limited Search Of A Vehicle Following A Terry Stop; This Misapplication Is Illustrative Of The Substantial Division In The States And Circuits On This Important Issue To Law Enforcement.

The instant matter involves an issue of substantial and continuing importance to law enforcement officials throughout the United States, i.e., the quantum of evidence necessary to justify a limited search of the passenger area of a motor vehicle for weapons after a proper stop under Terry v. Ohio, 392 U.S. 1 (1968). The majority opinion of the Pennsylvania Superior Court places severe and unreasonable restraints upon police officers in conducting the limited searches approved in Terry; given the remarkable inconsistency of the decisions throughout the nation on this critical issue, the Commonwealth

respectfully urges the granting of a Writ of Certiorari to the Pennsylvania Supreme Court in this matter. Unless further guidance is provided by the Court on this issue, such jurisprudentially undesirable conflicts will continue to appear.

The general legal boundaries concerning a stop based upon reasonable suspicion of criminal activity and a limited search for weapons were articulated in Terry v. Ohio. This standard holds that where a police officer possesses a reasonable and articulable suspicion that criminal activity is afoot, he may stop an individual believed to be involved in that activity; where the officer possesses a reasonable suspicion that the individual with whom he is dealing is armed, the officer may conduct a limited search of outer clothing for weapons. Id. In Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), this Court elaborated somewhat on the Terry doctrine by holding that a police officer may, upon properly stopping a motor vehicle,

justifiably conduct a limited search of the passenger compartment for weapons when he possesses a reasonable suspicion that the vehicle contains weapons.

Although this Court has frequently addressed the proof necessary to justify a stop based upon reasonable suspicion,[2] the Court has only very rarely addressed the second prong of Terry; i.e., the evidence required to allow a limited search for weapons. See, Long, Adams v. Williams, 407 U.S. 143 (1972), Terry. Indeed, other than the Long decision one decade ago, this Court has not otherwise addressed a vehicle search for weapons based upon reasonable suspicion, and most importantly at bar, this Court has not squarely addressed the precise issue of the quantum of proof necessary to justify a reasonable suspicion that the stopped vehicle actually contains weapons.

This dearth of Supreme Court authority has resulted in dramatically differing decisions throughout the country on this issue. Indeed, the cases collected by

Professor Wayne LaFave in his renowned treatise, Search and Seizure, dramatically illustrate the often incredibly inconsistencies in the decisions of state and federal courts on this issue. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, Second Edition, Section 9.4. A similar compilation of inconsistency on this issue can be found at "Search and Seizure: Furtive Movement or Gesture as Justifying Police Search", Ghent, 45 A.L.R.3rd 581.

The astonishingly inconsistent application of Terry and Michigan v. Long in Pennsylvania alone was illustrated in a published decision of the Pennsylvania Superior Court which was announced less than one month prior to the panel decision at bar. Commonwealth v. Morris, ___Pa.Super.___, ___A.2d___ (1992). Indeed, the Superior Court's published decision at bar is directly at odds with Morris, as the facts of the instant matter provided the police officers with substantially greater reason to search. In Morris, the Superior Court approved a

Terry-type search of a motor vehicle, even though the vehicle stop was quite routine (a failure to signal a right hand turn), and the officer merely observed the defendant pushing something under his seat. The incompatibility of Morris with the instant case is obvious on its face, and serves to illustrate the serious conflicts in the lower courts on this critical issue.

Under the simple facts at bar, it is incomprehensible that Officer Gibney lacked a reasonable suspicion to believe that a weapon might be located in the area searched. The record reveals that near midnight, the occupants of a vehicle fled from police without explanation from an area known for drug use and shootings. The suspects fled at high speed through railroad crossing gates and lights which warned of an oncoming train, and continued to avoid police for five blocks thereafter. Upon being fully stopped by police, the occupants of the car engaged in substantial movements with one another which, in the officer's experience, made the officer

fear for his safety. After removing the occupants from the car, the officer saw a bulge in the back pouch of the driver's seat, and reached into the pouch as a method of protecting his safety. At that point, the officer found the loaded handgun which gave rise to the instant prosecution. It is respectfully submitted that the clear facts at bar provide a proper vehicle for this Court to resolve the lower court's inconsistent approaches to this important issue.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari be issued on the Pennsylvania Supreme Court to review the decision below.

Respectfully submitted,

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Chief, Law & Appeals Unit

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FOOTNOTES

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1 The trial court's use of the term "pouch" in its opinion is less than precise. The record unequivocally reflects that the pouch was an integral part of the back of the driver's seat, and was not a separate container brought into the vehicle by its occupants.

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Alabama v. White, 496 U.S. 325 (1990);

Brown v. Texas, 443 U.S. 47 (1979);

Florida v. Bostik, ___U.S.___, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991);

Florida v. Rodriquez, 469 U.S. 1 (1984);

Florida v. Royer, 460 U.S. 491 (1983);

Minnesota v. Dickerson, ___U.S.___, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993);

New York v. Class, 475 U.S. 106 (1986);

Peters v. New York, 392 U.S. 40 (1968);

Reid v. Georgia, 448 U.S. 438 (1980);

Sibron v. New York, 392 U.S. 40 (1968);

United States v. Brignoni-Ponce, 422 U.S. 873 (1975);

United States v. Cortez, 449 U.S. 411 (1981);

United States v. Hensley, 469 U.S. 221 (1985);

United States v. Mendenhall, 446 U.S. 544 (1980);

United States v. Place, 462 U.S. 696 (1983);

United States v. Sharpe, 470 U.S. 675 (1985);

United States v. Sokolow, 490 U.S. 1 (1989);

J. A59005/1992

COMMONWEALTH OF PENNA., Appellant	:	IN THE SUPERIOR COURT OF PENNA.
V.	:	
PATRICK FOUNTAIN	:	NO. 01355 PHL 92

Appeal from the Order February 3, 1992 in the Court of Common Pleas of Delaware County, Criminal Division, at No. 4380-91

BEFORE: CIRILLO, POPOVICH, AND HOFFMAN, JJ.

OPINION BY HOFFMAN, J.: FILED DEC 23 1992

JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Delaware County be, and the same is hereby AFFIRMED.

By the Court:

PROTHONOTARY

Dated: December 23, 1992

APPENDIX "A"

J. A59005/1992

COMMONWEALTH OF PENNA., Appellant	:	IN THE SUPERIOR COURT OF PENNA.
V.	:	
PATRICK FOUNTAIN	:	NO. 01355 PHL 92

Appeal from the Order February 3, 1992 in the Court of Common Pleas of Delaware County, Criminal Division, at No. 4380-91

BEFORE: CIRILLO, POPOVICH, AND HOFFMAN, JJ.

OPINION BY HOFFMAN, J.: FILED DEC 23 1992

This is a Commonwealth appeal from the February 3, 1992 order suppressing evidence seized during a search of an automobile. The Commonwealth argues that the trial court erred in granting the suppression order where:

> 1) the vehicle drove away from the officer at a high rate of speed from a high crime area and ignored a traffic control device at a railroad grade crossing in violation of the Motor Vehicle Code, 2) the officer observed furtive movements among the vehicle's three occupants upon stopping the vehicle and 3) the operator of the vehicle was unable to provide a valid driver's license or proof of ownership of the vehicle.

Commonwealth's Brief at 3. For the following reasons, we affirm.

Appellee was arrested and charged with possession of a firearm without a license[1] and criminal conspiracy.[2] On January 4, 1992, appellee filed a motion to suppress the seizure of the gun. Following a hearing on January 13, 1992, the suppression court granted appellee's motion. The Commonwealth timely appealed from that order.[3]

Our standard of review of an order granting a motion to suppress is well-settled. We may consider

> only the evidence of the defendant's witnesses and so much of the Commonwealth evidence that, read in the context of the record as a whole, remains uncontradicted. Furthermore, our scope of appellate review is limited primarily to questions of

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[1] 18 Pa.C.S.A. §6106.

[2] 18 Pa.C.S.A §903.

[3] In its brief, the Commonwealth asserts that this order effectively terminates the instant prosecution. Accordingly, the order is appealable. Pa.R.A.P. Rule 311(d).

> law. We are bound by the suppression court's findings of fact if those findings are supported by the record. Factual findings wholly lacking in evidence, however, may be rejected.

Commonwealth v. Marconi, 408 Pa.Super. 601, 697, 597 A.2d 616, 619 (1991) (citations omitted), appeal denied ___ Pa. ___, 611 A.2d 711 (1992). We may reverse the suppression court only if its legal conclusions, drawn from the facts in the record, are erroneous. Commonwealth v. Cauto, 369 Pa.Super. 381, 393-94, 535 A.2d 602, 608-09 (1987), appeal denied 521 Pa. 601, 555 A.2d 112 (1988); Commonwealth v. Vinson, 361 Pa.Super. 526, 530, 522 A.2d 1155, 1157 (1987).

The following facts were found by the suppression court:

> 1. On June 15, 1991 at approximately 11:30 o'clock p.m., Officer Richard Gibney of the Darby Borough police department was on duty in full uniform in a parked police vehicle in the vicinity of 6th Street and Greenway Avenue in Darby Borough, Delaware County, PA, an area know for illegal drug activity.

2. Officer Gibney observed a parked vehicle with three occupants. As his vehicle approached, the subject vehicle was started and proceeded to pull away at a high rate of speed. Officer Gibney followed and at the intersection of 5th Street and Greenway Avenue the subject vehicle proceeded around railroad grade crossing gates which were down, a violation of the Motor Vehicle Code.

3. Officer Gibney activated his siren and flashing lights and stopped the vehicle approximately five blocks away. Two individuals were seated in the front seat of the subject vehicle and one individual in the back seat. Defendant, Patrick Fountain, was seated in the front passenger seat. Officer Gibney observed a great deal of movement between the occupants of the subject vehicle.

4. Officer Gibney requested the operator of the subject vehicle to produce his registration card; however, the driver responded that this was not his vehicle and that he had no cards. By this time, at least three other police officers had arrived at the scene to back up Officer Gibney. Officer Gibney directed the occupants to exit the subject vehicle and, as they did so, they were taken to the rear of the vehicle and patted down.

5. While other officers remained with the three occupants at the rear of the vehicle, Officer Gibney searched the vehicle's passenger

> compartment for weapons. On the back of the driver's seat the officer observed a pouch which "appeared to have something in it." He reached into the pouch and found a .25 caliber pistol which he seized. The three occupants of the vehicle were then placed under arrest for possession of the firearm without a license.

Order, 2-3-92, at 1-3. Based on the above facts the trial court was unable to conclude that the police officer was justified in searching for and seizing the weapon.

The Commonwealth first argues that the trial court erred in granting defendant's motion to suppress because the officer had sufficient probable cause to believe that the subject vehicle or its occupants were involved in criminal activity. The Commonwealth points to Commonwealth v. Milyak, 508 Pa. 2, 493 A.2d 1346 (1985) which sets forth the standard governing warrantless searches of automobiles. In Milyak, our Supreme Court stated that

> To justify ... a [warrantless] search..., an officer must have independent probable cause to believe that a felony has been

> committed by the occupants of the vehicle, or that it has been used in the furtherance of the commission of a felony, or the officer must have a basis for believing that evidence of a crime is concealed within the vehicle, or that there are weapons therein which are accessible to the occupants.

Id. at 8, 493 A.2d at 1349.

In its order granting suppression, the court stated that "[n]o testimony was presented which would justify opening and searching the pouch." Order, 2-3-92, at 4. Moreover, in its brief opinion in support of that order, the court noted that "[i]t was apparent from the testimony that the arresting officer possessed no imperative which would allow him to transgress constitutional bounds and search the pouch." Opinion, 4-10-92. We agree.

Officer Gibney testified that when he first noticed the parked car he saw no activity between the passengers of the car and anyone outside of the car that would amount to criminal activity. N.T. January

13, 1992, at 13. He further stated that before the car ran through the railroad gates, the only thing that made him suspicious was "the way [the car] sped off." Id. He only followed the car "to see what that led to, if they were running from me or what was going through [sic]...." Id. He claimed that if the car had not gone around the railroad gate, he would not have stopped them, but would only have continued to follow them. Id. at 14. Moreover, the officer did not describe what can be considered suspicious activity on the part of the car's occupants. Rather, he only said that he saw "movement" among them. We note that it was not until this appeal that the movements were described as "furtive."

The Commonwealth's argument that "the possible possession of stolen property is a factor to be considered in the evaluation of the existence of probable cause" is specious in light of the officer's testimony that he only stopped the car after it ran through the

railroad crossing. Moreover, the Commonwealth's reliance on Commonwealth v. Woodward, 307 Pa.Super. 293, 453 A.2d 358 (1982) is misplaced. In Woodward, a police officer stopped a vehicle after observing traffic offenses. The driver was unable to produce either a driver's license or registration but claimed that the car belonged to a relative. The officer then noticed two "Hertz Rental Car" stickers on the vehicle and detained the driver while the officer called the National Crime Information Center to determine whether the vehicle was stolen. The officer's observations of the stickers and the driver's inability to produce any rental agreement were clearly reason to suggest that the car did not belong to the driver.[4] In the instant case, on the

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[4] We note the Woodward involved only the question of the propriety of the detention and warrantless arrest of the driver. In the instant case, the detention for the Motor Vehicle Code violation was proper; the issue here concerns the propriety of the search.

other hand, the officer presented little reason to have suspected that the automobile was stolen.[5]

The Commonwealth's second argument is that the search was permissible under Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983). Pursuant to Michigan v. Long, a police officer may search a vehicle if he reasonably believes that the driver or an occupant is dangerous and that the driver or occupant may gain immediate control of weapons. Id. at 1049, 103 S.Ct. at 3481. The suppression court correctly concluded that under the circumstances, the officer did not reasonably entertain such a belief.

Officer Gibney waited for backup before he began taking the passengers from the car. N.T. at 15. Three uniformed officers joined Officer Gibney in detaining the passengers. Each of the three passengers was frisked as

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[5] The mere failure to present registration is not enough to give rise to a belief that a car is stolen.

they exited the car, and no weapons were found. Id. Officer Gibney and another officer then conducted the search of the car while the other two officers guarded the three men who were detained outside the vehicle. Id. at 16-17. Thus, when Officer Gibney was conducting the search of the passenger compartment of the automobile, the passengers no longer had access to the vehicle. This situation is distinguishable from the facts of Michigan v. Long. There, two police officers stopped a car which they had seen travelling erratically and at an excessive speed. When the officers repeated a request for identification, the driver who "appeared to be under the influence," walked toward the open door of the car, apparently to obtain the registration, and the officers followed him and saw a hunting knife on the floorboard of the driver's side of the car. The officers stopped the driver and subjected him to a Terry protective patdown which produced no weapons. The officers then

conducted a brief search of the automobile for other weapons which resulted in the discovery of marijuana.

Under the facts of the instant case, we are unable to find that an officer could reasonably believe that the driver or any of the occupants were dangerous and that they could gain immediate control of weapons. Accordingly, we affirm the order granting suppression of the evidence.

Affirmed.

CIRILLO, J., files a Dissenting Opinion.

J. A59005/1992

COMMONWEALTH OF PENNA., Appellant	:	IN THE SUPERIOR COURT OF PENNA.
V.	:	
PATRICK FOUNTAIN	:	NO. 01355 PHL 92

Appeal from the Order February 3, 1992 in the Court of Common Pleas of Delaware County, Criminal Division, at No. 4380-91

BEFORE: CIRILLO, POPOVICH, AND HOFFMAN, JJ.

DISSENTING OPINION BY HOFFMAN, J.:

FILED DEC 23 1992

I most respectfully dissent. While I agree with the majority's analysis regarding the rationale underlying a search under Michigan v Long, supra, I cannot agree that it is dispositive of this case. We are bound by the reasonable factual findings of the suppression court, Commonwealth v. Hamlin, 503 Pa. 210, 469 A.2d 137 (1983); however, we must reverse if we find an error of law. Commonwealth v. Cortez, 507 Pa. 529, 491 A.2d 111, cert. denied, 474 U.S. 950 (1985).

A forcible stop of a motor vehicle by a police officer constitutes a seizure of a person and activates the protections of the Fourth Amendment of the U.S. Constitution. Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973); Commonwealth v. Brown, 388 Pa.Super. 187, 565 A.2d 177 (1989). However, a forcible stop and seizure is not unreasonable under the Fourth Amendment where the officer has articulable and reasonable grounds to suspect, or probable cause to believe that criminal activity may be afoot. Swanger, supra; see Commonwealth v. Richards, 458 Pa. 455, 327 A.2d 63 (1974). Here, the record establishes that the vehicle in which Fountain was a passenger was stopped for a violation of the Motor Vehicle Code. Such a stop under these facts is permissible under 75 Pa.C.S.A. §6308. The initial stop, therefore, was proper. Commonwealth v. Elliott, 376 Pa.Super. 536, 546 A.2d 654 (1988), alloc. denied, 521 Pa. 617, 557 A.2d 721 (1989); see also Swanger, supra.

A search without a warrant is generally unreasonable. Mapp v. Ohio, 367 U.S. 347 (1961); Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963) cert. denied, 375 U.S. 910 (1963). Police may not search a home or any place in which a person has a reasonable expectation of privacy without a warrant. Katz v. United States, 389 U.S. 347, 357 (1967). A warrant is obtained after a neutral magistrate finds that probable cause exists for a search for evidence of a crime. Aguilar v. Texas, 378 U.S. 108, 109 (1964). Probable cause is a product of a totality of the circumstances presented to the magistrate. Illinois v. Gates, 462 U.S. 213, 230 (1983). See also Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988 (1991).

There are, however, exceptions to the warrant requirement. One is the automobile exception. The automobile exception is separate and distinct from a search to protect the safety of a police officer under Michigan v. Long, supra, and is based on a

wholly different rationale. Commonwealth v. Baker, 518 Pa. 145, 149, 541 A.2d 1381, 1383 (1988). Automobiles are excepted from the warrant requirement because they are inherently mobile and citizens have a lower expectation of privacy in their cars than in their homes. Milyak, supra. Under the automobile exception an officer may search a car if he has independent probable cause to believe the automobile has been used in the furtherance of a felony or contains contraband or evidence of a crime. Id.

Thus, the question becomes did Officer Gibney have probable cause to believe the vehicle contained contraband or evidence of a crime. Probable cause is defined as "a substantial basis for concluding that a search would uncover evidence of wrongdoing." Gates, 462 U.S. at 236. The level of probable cause needed to invoke the automobile exception to the warrant requirement is the same as the probable cause

needed for a warrant. Milyak, 508 Pa. 10, 493 A.2d at 1350.

I would find probable cause to search the vehicle under the automobile exception in the testimony of Officer Gibney, who had been a narcotics officer for eight years. Officer Gibney observed a vehicle in a high-crime area which sped off at his approach in an unmarked police car. The car veered around a grade level train crossing barrier in its effort to elude the officer. Officer Gibney turned on his siren and lights; five blocks later the car he was pursuing stopped. As the officer approached the car, he observed movement among the occupants, movement that he "didn't like," based on his training and experience. That movement drew Officer Gibney's attention to the pouch behind the driver's seat. There he saw a bulge which turned out to be the gun in question.

Using the Gates, supra, formulation of the totality of the circumstances, I would find that Officer Gibney had the requisite

probable cause that contraband or evidence of a crime would be found in the vehicle in question, Milyak, supra, and that, therefore, his search of the vehicle was proper and the evidence should not be suppressed.

J. S12015 (1993)

COMMONWEALTH OF PENNA., Appellant	:	IN THE SUPERIOR COURT OF PENNA.
V.	:	
DECARUS THOMAS	:	NO. 03596 PHL 92

Appeal from the of the Court Common Pleas of Criminal Division, of Delaware County, at No. 4381-91

BEFORE: CIRILLO, HUDOCK AND BROSKY, JJ.

JUDGMENT ORDER

FILED APRIL 27, 1993

This is a Commonwealth appeal from the order of the court below suppressing evidence seized during a search of an automobile. The Commonwealth argues that the court erred in granting the suppression motion where:

> 1) the vehicle drove away from the officer at a high rate of speed from a high crime area and ignored a traffic control device at a railroad crossing which warned of an approaching train, 2) the officer observed furtive movements among the vehicle's three occupants

> upon stopping the vehicle, and 3) the operator of the vehicle was unable to provide a valid driver's license or proof of ownership of the vehicle[.]

Commonwealth's Brief at page 3. This precise issue has been decided adversely to the Commonwealth under identical facts in a companion case. Commonwealth v. Fountain, ___ Pa.Super. ___, ___ A.2d (1992) (J. A59005/1991, No. 01355 Philadelphia 1992, filed December 23, 1992). Thus, we are constrained to affirm the grant of the suppression motion on the basis of Fountain.

Order affirmed.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMM. OF PENNA : NO. 4380

V. :

PATRICK FOUNTAIN : OF 1991

Dennis C. McAndrews, Esq., Attorney for Commonwealth
Francis A. Holloran, Jr., Esq., Attorney for Defendant

OPINION

KEELER, J. FILED:

On January 13, 1992, the Court conducted a hearing in connection with omnibus motions filed by the defendant in this case. Specifically, the defendant challenged the arresting officer's act of opening a pouch from the back seat of a vehicle in which the defendant was an occupant. It was apparent from the testimony that the arresting officer possessed no imperative which would allow him to transgress constitutional bounds and search the pouch. Specific findings of fact and applicable conclusions of law were issued by the Court on February 3, 1992. The Court

stands by these determination. As such, no further comment is necessary.

BY THE COURT:

CHARLES C. KEELER,
J.

APPENDIX B

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMM. OF PENNA : NO. 4380

V. :

PATRICK FOUNTAIN : OF 1991

Thomas F. Lawrie, Jr., Esq., Attorney for Commonwealth
Francis A. Holloran, Jr., Esq., Attorney for Defendant

OPINION

KEELER, J. FILED:

AND NOW, this 3rd day of February, 1992, upon consideration of an omnibus motion to suppress evidence having been filed on behalf of defendant and after a hearing having been held thereon, the Court enters the following:

I. FINDINGS OF FACT

1. On June 15, 1991 at approximately 11:30 o'clock p.m., Officer Richard Gibney of the Darby Borough police department was on duty in full uniform in a parked police vehicle in the vicinity of 6th Street and Greenway Avenue in Darby Borough, Delaware

County, PA, an area known for illegal drug activity.

2. Officer Gibney observed a parked vehicle with three occupants. As his vehicle approached, the subject vehicle was started and proceeded to pull away at a high rate of speed. Officer Gibney followed and at the intersection of 5th Street and Greenway Avenue the subject vehicle proceeded around railroad grade crossing gates which were down, a violation of the Motor Vehicle Code.

3. Officer Gibney activated his siren and flashing lights and stopped the vehicle approximately five blocks away. Two individuals were seated in the front seat of the subject vehicle and one individual in the back seat. Defendant, Patrick Fountain, was seated in the front passenger seat. Officer Gibney observed a great deal of movement between the occupants of the subject vehicle.

4. Officer Gibney requested the operator of the subject vehicle to produce his registration card; however, the driver

responded that this was not his vehicle and that he had no cards. By this time, at least three other police officers had arrived at the scene to back up Officer Gibney. Officer Gibney directed the occupants to exit the subject vehicle and, as they did so, they were taken to the rear of the vehicle and patted down.

5. While other officers remained with the three occupants at the rear of the vehicle, Officer Gibney searched the vehicle's passenger compartment for weapons. On the back of the driver's seat the officer observed a pouch which "appeared to have something in it." He reached into the pouch and found a .25 caliber pistol which he seized. The three occupants of the vehicle were then placed under arrest for possession of the firearm without a license.

I. CONCLUSIONS OF LAW

1. The Fourth Amendment of the Constitution prohibits only unreasonable searches and seizures. Mincey v. Arizona,

437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). See also Pa.Const. art. I section 8.

2. Police encounters with suspects may be broken down into three categories: a mere encounter; an investigative detention; and custodial detention. See generally 3 LaFave, Search and Seizure, 332-422 (1987).

3. An investigative detention or Terry stop requires reasonable suspicion on the part of the police, since the suspect is subject to a stop and detention, but the stop does not involve coercive conditions which would constitute the functional equivalent of arrest. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

4. In contrast, custodial detention must be supported by probable cause as it involves a detention under conditions or of a duration which become so coercive as to result in the functional equivalent of arrest. See Dunaway v. New York, 442, U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

5. At the time Officer Stipen stopped the subject vehicle, he had sufficient reasonable suspicion to conduct an investigative detention of all occupants.

6. No testimony was presented which would justify opening and searching the pouch.

Therefore, defendant's motion to suppress the presentation of evidence concerning the presence of the gun must be GRANTED.

BY THE COURT:

CHARLES C. KEELER,
J.

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMM. OF PENNA., Petitioner	:	202 E.D. Allocatur Docket 1993
VS.	:	
PATRICK FOUNTAIN, Respondent	:	Petition for Allowance of Appeal from Superior Court

O R D E R

PER CURIAM:

AND NOW, this 9th day of September, 1993, the Petition for Allowance of Appeal is hereby denied.

A TRUE COPY FROM RECORD
Attest: 9/10/93

William G. Corey, Esquire
Deputy Prothonotary, Supreme Court of Pennsylvania, Eastern District

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMM. OF PENNA., Petitioner	:	348 E.D. Allocatur Docket 1993
VS.	:	
DECARUS THOMAS, Respondent	:	Petition for Allowance of Appeal from Superior Court

O R D E R

PER CURIAM:

AND NOW, this 16th day of September, 1993, the Petition for Allowance of Appeal from the Superior Court is hereby denied.

A TRUE COPY FROM RECORD
Attest: 9/16/93

William G. Corey, Esquire
Deputy Prothonotary, Supreme Court of Pennsylvania, Eastern District

APPENDIX C

(2)

Supreme Court, U.S.
FILED
JAN 6 1994
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

No. 93-911

COMMONWEALTH OF PENNSYLVANIA,
Petitioner
VS

PATRICK FOUNTAIN
and
DECARUS THOMAS,
Respondents

BRIEF OF PATRICK FOUNTAIN IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT FILED BY THE COMMONWEALTH OF PENNSYLVANIA

Patrick J. Connors
Assistant Public Defender
Chief, Appeals Division
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Id. No. 38937
Counsel of Record For
Patrick Fountain

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

WHETHER POLICE OFFICERS MAY SEARCH A VEHICLE FOR WEAPONS AFTER STOPPING IT FOR A SUMMARY TRAFFIC OFFENSE, WHERE THERE IS NO INDICATION IN THE RECORD THAT THEY HAD A REASONABLE BELIEF THAT THE OCCUPANTS OF THE VEHICLE WERE ARMED AND DANGEROUS AND THAT WEAPONS WERE PRESENT IN THE VEHICLE WITHIN THE IMMEDIATE REACH OF THE PERSONS STOPPED.

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392 U.S. 1 (1968).....7,12

COUNTER STATEMENT OF THE CASE

On June 15, 1991, at approximately 11:30 p.m., an Officer of the Darby Borough Police Department was patrolling in an unmarked police vehicle when he noticed a parked vehicle with three occupants drive away at a "high rate of speed". (R at 13; App. at 23a, 24a).). He started to follow this automobile and, at one point, it swerved around the gates of a railroad intersection warning device while those gates were down and signifying an oncoming train. (R at 13; App. at 24a). The Officer then activated his siren and overhead lights and stopped the vehicle. (R at 13). As the stop occurred, he noticed some "heavy movement" between the occupants although he admitted that he did not see any items pass

between them. (R at 33). The Officer testified that he stopped the vehicle solely because it went around the railroad gate and, had it not done this, he would have merely followed the car and would not have stopped it. (R at 21, 22).

After the car was stopped, the Officer approached it and asked the driver for his license and the vehicle's registration. The driver told him that he did not have his license and that the car was not his. (R at 14). At this point, the Officer "removed" the occupants from the automobile. (R at 14, 16). He did so in spite of the fact that he did not feel threatened by the persons in the vehicle and, in fact, he admitted at the Suppression Hearing that none of them threatened him or made any motions such as to hide a gun. (R 21-22). The

occupants of the vehicle, including Respondent Patrick Fountain, were then patted down and the car was searched. (R at 16). The pat-down revealed no contraband although one of the occupants had a "large sum of money." (R at 16). The search of the car, however, uncovered a gun which had been placed in a large pocket attached to the back of the driver's seat. (R at 17). Based upon these facts, the Honorable Charles C. Keeler of the Court of Common Pleas of Delaware County suppressed the gun found within the car and a Superior Court Panel, after hearing Oral Argument and considering the Briefs of the parties, affirmed the Order. The Commonwealth subsequently filed an Application for Reargument with the Superior Court but this Application was denied.

The Commonwealth then filed a timely Petition For Allowance of Appeal to the Pennsylvania Supreme Court which was also denied. It now files a Petition For Writ of Certiorari to the Pennsylvania Supreme Court to which this Brief responds.

REASON WHY THE PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT SHOULD BE DENIED

I. THE APPELLATE COURTS OF THE COMMONWEALTH OF PENNSYLVANIA HAVE CORRECTLY CONSTRUED AND APPLIED THE PRECEPTS OF TERRY V. OHIO, 392 U.S. 1 (1968) AND MICHIGAN V. LONG, 463 U.S. 1032 (1983).

The Commonwealth argues that the United States Supreme Court case of Michigan v. Long, 463 U.S. 1032 (1983) permitted the Officer to search the vehicle since, according to the Commonwealth, the Officer herein reasonably believed that the occupants of the vehicle were dangerous and could gain immediate control of weapons.

This theory, however, is of no avail to it since the Record contains no facts from which the Officer could have reached such

conclusions.

Initially, he testified that he stopped the vehicle solely because it went around the railroad gate and, had the vehicle not done this, he would have merely followed the car and would not have stopped it. (R at 21, 22). Clearly, he did not feel threatened at this point. Moreover, after the stop occurred, there is nothing to indicate that the Officer was threatened in the least by the persons in the vehicle. Indeed, the Officer admitted at the Suppression Hearing that none of the people in the car threatened him or made any motion such as to hide a gun. (R at 21-22). Thus, there is no support in the Record for a reasonable belief that the occupants were dangerous.

In addition, there is no indication that the occupants had <u>immediate</u> access to weapons

once they had been taken from the car. First, the Record is devoid of evidence that the Officer had a reasonable belief that there was a weapon in the car and, moreover, while the car was searched, the occupants were detained and watched by three other members of the police force. Thus, they had no immediate access to any weapons within the car and, as such, this case is clearly distinguishable from Michigan v. Long, supra.

Nevertheless, the Commonwealth seeks to enhance the Record so as to create a factual basis for its conclusions. Specifically, it argues that the vehicle "fled from police" and attempted to "avoid police". (Petition for Certiorari at 12). This was not listed as a Finding of Fact by Judge Keeler and, even if it was, it would not have been supported by the Record. The testimony of the Police

Officer clearly showed that the incident occurred at night, in darkness, while he was driving an unmarked police car. (R at 12). Although he was in uniform, there is no indication that the uniform could be seen by any of the occupants and, moreover, the Officer testified that he did not have his hat on while he was driving. As such, it cannot be inferred from the Record that the occupants of the subject vehicle had any indication whatsoever that they were being followed by a police officer. In fact, the Officer never testified that the vehicle "fled" or "avoided police".

Likewise, the Commonwealth's statement that the Officer observed "furtive movements" among the occupants is an enlargement of the facts of Record. (Petition for Writ of Certiorari at i). The Officer testified at

the Suppression Hearing that he noticed some "heavy movement" among the passengers of the vehicle but he also admitted that he did not see anything pass between them. (R at 15). Based upon this evidence, the Hearing Court only made a Finding of Fact that the Officer "observed a great deal of movement between the occupants of the subject vehicle". (Trial Court Finding of Fact No. 3; App. at 24a). Nowhere in the Record, either in the Findings of Fact or in the testimony of the Officer, was the word "furtive" used to describe the movements of the occupants. As such, this Court should not accept it as a valid description of those movements.[1]

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[1]The Superior Court in its Opinion chided the Commonwealth for using the word "furtive" to describe the movement of the vehicle's occupants. See Superior Court Opinion at 5; App. at 8a ("we note that it was not until this Appeal that the movements were described as 'furtive'").

The Record herein supports only the factual conclusions that the vehicle in question took off at a high rate of speed from a parked position, in a high crime area and, a short time later, swerved around the gates at a railroad intersection at a time when those gates were down. Moreover, when stopped, the driver of the vehicle could produce neither a driver's license nor a registration for the vehicle. The Record does not support a conclusion that the police officers had a reasonable belief that the occupants of the vehicle were armed or dangerous and that they had immediate access to weapons in the vehicle.

Pursuant to Terry v. Ohio, supra, and Michigan v. Long, supra, the Hearing Court correctly suppressed the gun and the Appellate Courts of Pennsylvania correctly

affirmed this decision.

CONCLUSION

Based upon the facts and law outlined supra, Respondent Patrick Fountain respectfully requests that the Court deny the Petition for Writ of Certiorari to the Pennsylvania Supreme Court which was filed by the Commonwealth of Pennsylvania.

Respectfully submitted:

PATRICK J. CONNORS
Assistant Public Defender
Attorney of Record for
Patrick Fountain